SAAD SALLEH

v.

OOI SAY HUP

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[ORIGINATING MOTION NO. 32-49/84]
22 JANUARY 1987

LAND LAW: *Application by one of two joint owners of certain land for removal of caveat entered into by the respondent claiming to be the purchaser thereof - Writ by respondent against applicant for specific performance - Whether respondent a person within meaning of s. 323(1) of the National Land Code.*

This was an application by one of two joint owners of certain land for removal of a caveat entered into by the respondent claiming to be the purchaser thereof by virtue of an agreement of sale and purchase dated 19 October 1982.

The applicant had stated that by a deed poll made on 14 June 1929 his grandmother had conveyed the property unto herself and his father during their lives and, from and after their death and thereafter, unto one Japar bin Salleh and himself as joint tenants.

The grandmother and his father having died, the disputed property devolved upon the applicant and Japar as joint tenants they being the remaindermen under deed poll.

The applicant as beneficiary entered into an agreement for sale dated 19 October 1982 whereby he purported to agree to sell the disputed property to the respondent for a consideration of RM90,000. Among the essential provisions of the agreement was that the applicant's joint owner, Japar, was of unsound mind.

Upon the respondent failing to pay the further sum of RM20,000 on or before 20 December 1982, the applicant caused to be served upon the respondent two notices in writing with a view to rescinding and revoking the agreement and forfeiting the deposit of RM10,000. He also called upon the respondent to remove the caveat herein.

The respondent admitted not paying the sum of RM20,000 under Clause 5 of the agreement, but contended that this was because the applicant had failed to show proof that the other registered proprietor, Japar, was truly of unsound mind and that consequently the applicant had the legal capacity to act on Japar's behalf.

The respondent had on 29 April 1985 issued a writ against the applicant for specific performance of the agreement accompanied by a statement of claim in which he alleged that Japar was of unsound mind. However, the respondent did not make Japar a party to the suit nor had any of the necessary steps been taken by the applicant under the Mental Disorders Ordinance 1952.

Held:

[1] It was manifestly clear that in this case none of the steps under the Mental Disorders Ordinance 1952 had been taken by the applicant so that if indeed Japar was of unsound mind, the agreement would not have been binding on his estate. Alternatively if Japar was of sound mind the agreement would also not have been binding on Japar as he was a stranger to it. Therefore the entry of the caveat by the respondent which was expressed to bind the whole of the disputed property could not be justified.

[2] As to the action for specific performance by the respondent, the Court could not "jump as it were, the condition precedent for the seeking of an order to sell and proceed to the order of specific performance of the sale".

[3] Even if the respondent is able to establish the various averments in the statement of claim, his claim for specific performance is bound to fail as the appropriate reliefs to which he would be entitled would only be, return of the money paid and, perhaps, damages.

[4] In all the circumstances, the respondent was not a person "claiming any right to such title or interest" within the meaning of s. 323(1) of the National Land Code.

[Removal of caveat ordered. Respondent to pay the costs of the application to applicant]

Cases referred to:
Chin Cheng Hong v. Hameed & Ors. [1954] MLJ 169
Haroon bin Guriaman v. Nik Mah [1951] MLJ 209
Official Assignee v. Madam Chan Kam Lin [1963] MLJ 118
Karrupiah v. Subramaniam [1971] 2 MLJ 116
Inter-Continental Mining Co. Sdn. Bhd. v. Societe des Etains de Bayas Tudjuh [1974] 1 MLJ 145
Macon Engineers Sdn. Bhd. v. Goh Hooi Yin [1976] 2 MLJ 53
Gan Hong How v. Aziz Beg [1954] MLJ 202

Legislation referred to:
Mental Disorders Ordinance 1952, ss. 3(1), 10(1), 16, 17
National Land Code 1965, s. 323(1)

For the applicant - V. Muthusamy; M/s V. Muthusamy & Co.
For the respondent - Yeap Ghim Guan; M/s. Khor, Ong & Co.

JUDGMENT

Edgar Joseph Jr J:

This was an application by one of two joint owners of certain land comprised in Lot No. 994 Mukim 6 Province Wellesley Central ("the disputed property") for removal of a caveat entered by one Ooi Say Hup, the respondent, claiming to be the purchaser thereof by virtue of an agreement of sale and purchase dated 19 October 1982.

I shall assume in favour of the respondent that an agreement for sale of land gives the purchaser a sufficient interest in the land capable of being protected by a caveat. Although there was some conflict of judicial opinion in cases decided under the former Land Code (Cap 138) as to whether an agreement of sale and purchase of land can confer caveatable interest - see for example, *Chin Cheng Hong v. Hameed & Ors.* [1954] MLJ 169 (per Buhagiar J), *Sellamah v. Registrar of Titles, Perak* unreported Perak Civil Appeal No. 16 of 1959 and *Haroon bin Guriaman v. Nik Mah* [1951] MLJ 209 (per Briggs J) on the one hand and *Official Assignee v. Madam Chan Kam Lin* [1963] MLJ 118 (per Wilson J) on the other - I think it is tolerably clear from a comparison between the wording of s. 166 of the former Land Code and s. 323(1) of the National Land Code. that, whereas, under the former provision, only a person "claiming title to or any registrable interest" could enter a caveat, the latter is wider and permits any person "claiming any right to such title or interest" to do so.

A purchaser under an agreement for sale and purchase of land, if successful in an action for specific performance, would be entitled to a valid and registrable transfer of the land in his favour and thus secure title to the land. Accordingly, his position pending determination of the suit is that of one who is claiming "a right to title or interest in land". In order, therefore,

to preserve the *status quo*, it would be both just and convenient to protect his position by entry of a caveat. I find support for these views in *Karrupiah v. Subramaniam* [1971] 2 MLJ 116, *Inter-Continental Mining Co. Sdn. Bhd. v. Societe des Etains de Bayas Tudjuh* [1974] 1 MLJ 145 and, of course the important case of *Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53.

I must now turn to consider the particular circumstances of this case. The essential facts are concise and, are neither complicated nor, for the matter, in dispute.

According to his affidavit filed in support of the Application, the applicant had stated that by a deed poll made on 14 June 29, being Ex SBS1, his grandmother, one Seetee Jaliah bt. Lebai Snoo, had conveyed the disputed property unto herself and his father, one Salleh bin Mat Esah, during their lives and, from and after their death and thereafter, unto one Japar bin Salleh and himself as joint tenants.

In the events which transpired, both Salleh and Seetee having died in the years 1936 and 1952, respectively, the disputed property devolved upon the applicant and Japar as joint tenants, they being the remaindermen under the deed poll.

Then, the applicant as beneficiary, entered into an agreement for sale dated 19 October 1982, ("the agreement") whereby he purported to agree to sell the disputed property to the respondent for a consideration of RM90,000.

I shall now set out the essential provisions of the agreement so far as relevant to this case.

It was first of all recited in the preamble that the applicant's joint owner Japar was of unsound mind and that he had been a patient of the hospital Sakit Kosta, Sungei Buloh, Kuala Lumpur, for a duration of ten years.

By Clause 2 the applicant as vendor acknowledged the receipt of RM10,000 of the purchase price by way of forfeitable deposit and the balance was to be paid on the day fixed for completion.

By Clause 3 the sale was subject to various terms and conditions, namely:

(a) The vendor deducing a good and marketable title to the property sold;

(b) The said property being freehold property and free from any incumbrances;

(c) Production to the purchaser of all documents of title in the possession of the Vendor relating to the said property;

(d) Any defect in title to the property sold to be rectified and perfected by and at the expense of the Vendor;

(e) An Order of Court to be obtained to prove that Japar Bin Salleh the registered co-owner, is of unsound mind and that his share of the said property derived from the sale thereof be held by the Public Trustee;

(f) Vacant possession of the said property to be given upon execution of the agreement.

By Clause 4, completion was to take place within 6 months from the date of execution of the agreement or upon compliance by the vendor with the terms and conditions of Clause 3 whichever shall be later.

By Clause 5, the respondent as purchaser, was to pay the applicant as vendor, a further sum of RM20,000 on or before 20 December 1982, failing which the deposit of RM10,000 paid under clause 2 was to be forfeited and the agreement was to be treated as cancelled and rendered null, void and of no effect.

By Clause 6, completion was to be effected by payment of the balance purchase price of RM60,000 to M/s. Khor, Ong & Co., solicitors, as stakeholder on their undertaking to forward Japar's share to the Public Trustee and the applicant's share to the applicant, whereupon, the applicant would execute a valid and registrable transfer in favour of the purchaser.

By Clause 13, it was provided that if the title was good and marketable and the purchaser fails to pay the balance purchase price of RM60,000 on the day fixed for completion, then the deposit of RM10,000 shall be forfeitable to the vendor as liquidated damages for breach of contract.

By Clause 16, the vendor was to permit the purchaser to file a private caveat against the disputed property but, in the event of the purchaser failing to complete the purchase, or if, for any reason, the agreement was rescinded, the purchaser would have to withdraw the same.

By Clause 17, the purchaser was to be entitled to specific performance of the contract.

By Clause 18, time wherever mentioned was to be the essence of the contract.

The applicant then alleged that, contrary to Clause 5 of the agreement, the respondent had failed to pay the further sum of RM20,000 on or before 20 December 1982. Consequently, he caused to be served upon the respondent, notices in writing dated 26 January 1983 and 7 March 1983 with a view to rescinding and revoking the agreement and, forfeiting the deposit of RM10,000. He also called upon the respondent to remove the caveat herein.

In his affidavit in opposition the respondent admitted that he did not make the payment of the sum of RM20,000 referred to in Clause 5 of the agreement but explained that this was because the applicant had, despite several assurances given to respondent, failed to show proof that the other registered proprietor Japar was truly of unsound mind and been a patient of hospital Sakit Kosta, Sungei Buloh, Kuala Lumpur, and, that consequently, the applicant had the legal capacity to act on Japar's behalf.

The respondent, I must add, had on 29 April 1985 issued a writ against the applicant for specific performance of the agreement accompanied by a statement of claim in which he alleged the Japar was, at the material time, of unsound mind. However, the respondent did not make Japar a party to this suit nor, apparently, had any of the necessary steps been taken by the applicant under the Mental Disorders Ordinance 1952, to obtain an order of Court, directing an enquiry to determine whether Japar was of was not or unsound mind and incapable of managing himself and his affairs (s. 3(1)) and, if he was, by obtaining a further order for the appointment of a committee or committees of his person and estate (s. 10(1)). Thereafter, the leave of the Court would have to be obtained to sell Japar's share of the disputed property, provided always that the proceeds of sale are to be applied for the purposes stipulated in s. 16. Only after all these steps are taken would the committee of the disordered person's estate be in a position to execute the necessary conveyance and instrument of transfer in his name and on his behalf relative to any sale as the Court shall order (s. 17).

It was manifestly clear that in this case, none of the steps adumbrated above had been taken by the applicant so that if, indeed, Japar was of unsound mind the agreement would not have been binding on his estate. Alternatively, if he was of sound mind the agreement would also not have been binding on him as he was a stranger to it.

In these circumstances, I fail to see how the entry of the caveat by the respondent in this case which was expressed to bind the whole of the disputed property could be justified.

I would add that the agreement was not simply an agreement to sell the disputed property; so far as Japar's share was concerned,it was in effect, merely an agreement to obtain leave of the Court to sell, in case he was of unsound mind, and only to sell after such leave had been granted. I have already mentioned that the respondent has filed an action for specific performance of the agreement. However, I fail to see how the Court could, in the words of Abbott J in *Gan Hong How v. Aziz Beg* [1954] MLJ 202 "jump, as it were, the condition precedent for the seeking of an order to sell and proceed to the order of specific performance of the sale". One cannot predict whether the result of the enquiry under s. 3(1) would show that Japar was of unsound mind and, if so, following the appointment of a committee whether the Court would grant such leave. If leave were refused, the claim for specific performance would have to be refused and the respondent could, at most, recover damages for breach of contract and the return of the money paid as being money for breach of contract. I am, however, thoroughly satisfied, for the reasons stated, that even if the respondent is able to establish the various averments in the statement of claim, his claim for specific performance is bound to fail as the appropriate reliefs to which he would be entitled would only be, return of the money paid and, perhaps, damages.

In all the circumstances, the respondent not being a person "claiming any right to such title on interest" within the meaning of s. 323(1) National Land Code, I had no option but to order the removal of the caveat and to make a further order that he should pay the costs of the application to the applicant.

I must mention, by way of postscript, that the grounds upon which I made an order in terms of this application were wholly different from those which were urged upon me during the argument but, I found it necessary to do so, in order to satisfy the insistent demands for justice.

Also found at [1987] 1 CLJ 493